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No. 00-1464

In the

Supreme Court of the United States

PHELPS DODGE CORPORATION and
ARIZONA PUBLIC SERVICE COMPANY,

Petitioners,

v.

THE UNITED STATES, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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28 pp

QUESTION PRESENTED

Does a sudden, unpredictable and retroactive change in judicial precedent that revokes vested property rights in groundwater constitute a taking of private property without just compensation in violation of the Fifth Amendment to the United States Constitution?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to submit the attached brief amicus curiae in support of Petitioners, Phelps Dodge Corporation, et al.[1] Written consent for amicus participation in this case was granted by Arizona Public Service Company; Bella Vista Ranches, LLP; Bella Vista Water Co., Inc.; Central Arizona Irrigation and Drainage District; City of Pheonix; City of Tempe; Cortaro-Marana Irrigation District; Cortaro Water Users Assoc.; Helm & Kyle, Ltd.; Maricopa County Water Conservation District No. 1, et al.; New Magma Irrigation and Drainage District; Phelps Dodge Corporation; Rigby Water Co., Inc.; Roosevelt Irrigation District; The United States; Town of Gilbert; Town of Wickenburg; Valencia Water Co., Inc. Letters indicating consent have been lodged with the clerk of this Court. Written consent was denied by the Gila River Indian Community; San Carlos Apache Tribe; Tonto Apache Tribe, et al.; Yavapai Apache Nation, and the remaining parties have not responded.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has a long history of advocacy before this Court and has participated in numerous cases involving the Takings Clause of the Fifth Amendment to the United States Constitution. For example, earlier this term, PLF attorneys represented Mr. Palazzolo in *Palazzolo v. Rhode Island* (99-2047) (decision pending). PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and Mrs. Suitum in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

PLF seeks to augment the arguments of Petitioners by discussing the concept of judicial takings as a significant federal issue that has not been resolved by this Court. PLF believes its public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented.

For the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: May, 2001.

Respectfully submitted,

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STATEMENT OF THE CASE

In 1974, a general adjudication of all rights to use water on the Gila River System was initiated in the State of Arizona. This adjudication is still continuing. It involves more than 66,000 claims by more than 24,000 claimants, and is one of the most complex legal proceedings ever adjudicated in the United States. Ultimately, this case will decide the amount of water to which users are entitled for farming, domestic, and other uses. Since Arizona has such an arid climate, the allocation of water is a very serious matter.

In the course of framing issues that would determine the future course of the adjudication, the trial court held hearings on the relationship between groundwater and surface water. This relationship is extremely important because of the nature of Arizona's water supply and the differences between surface water and groundwater in Arizona water law. Under Arizona law, surface water may be appropriated, but groundwater may not. Instead, landowners have a right to use the groundwater below their land for reasonable beneficial purposes without having to submit to the regulatory scheme that controls appropriation. This is significant because the water supply of the Gila River System is over appropriated. In other words, water users have appropriative rights to use more surface water than the system can supply. Thus, if the Arizona courts are permitted to redefine appropriable surface water to include water that was previously considered groundwater, landowners who rely on groundwater will lose their long-held right to reasonable use of such waters.

Water appropriation is governed by the principle of "first in time, first in right." Those who appropriate earlier have a higher right that is paramount over those who appropriate later. Thus, in times of shortage (which in Arizona is essentially all the time), later appropriators will not get as much water as prior appropriators. Since, in the past, groundwater use was not

governed by the law of appropriation, users of groundwater may have no priority to use surface water. Therefore, some groundwater users whose water is redefined to be appropriable surface water will be left without any right to use water whatsoever.

Unfortunately, this is exactly what has happened. The trial court that is overseeing the adjudication determined that surface water includes any water from the "subflow" zone of a stream. The "subflow" zone is very large and includes water being pumped and utilized miles away from the stream itself. Arizona law has never interpreted surface water to extend so far. Now, landowners who have been pumping groundwater for years with the understanding that Arizona law protects as property their right to use the water under their land must submit to an adjudicatory proceeding that threatens to entirely eliminate their rights.

On September 22, 2000, the Arizona Supreme Court affirmed the trial court's definition of surface water. Groundwater users argued before the Arizona Supreme Court that the trial court's definition of surface water redefined their property right so dramatically that it constitutes a taking of that right in violation of the Fifth Amendment. The Arizona Supreme Court rejected that argument in a single paragraph, asserting for the first time that there is no property right in the use of groundwater. The Petitioners have asked the United States Supreme Court to review the case because they claim the adjudication has resulted in their private property being taken for public use without just compensation in violation of the Takings Clause of the Fifth Amendment.

SUMMARY OF THE ARGUMENT

This case presents an important question of federal law that has not been, but should be, settled by this Court. Since the Fifth Amendment, through the Fourteenth Amendment, is a constitutional limitation on the power of the states, alleged infringements by states of the Fifth Amendment right not to

have one's private property taken for public use without just compensation are questions of federal law. This Court has often examined state acts to determine whether they go too far in violating constitutional provisions. This Court has specifically required such an inquiry when the issue is whether property has been taken in violation of the Fifth Amendment.

The United States Supreme Court has not explained whether the Fifth Amendment places any limitation on the power of state courts to redefine the nature of property. Nevertheless, earlier decisions of this Court, along with an important concurrence by Justice Stewart in *Hughes v. Washington*, 389 U.S. 290 (1967), have encouraged state and federal courts at every level to modify their decisions in order to avoid "judicial takings." In contrast, however, many courts, like the state court in this case, have issued decrees which change long-held property rights without regard for constitutional implications. Therefore, this Court should determine whether a court may take private property without the payment of just compensation by means of judicial fiat.

The case at bar raises the important federal question of "judicial takings" clearly. The Arizona Supreme Court has abandoned a narrow rule defining surface water that has been in effect for 70 years. By eliminating the requirement that appropriable underground water travel in water courses with well-defined banks, the Arizona Supreme Court has permitted changing principles of hydrology to extend the effective boundaries of the surface stream many miles away from the stream itself, far beyond what the law ever allowed previously. Consequently, wells that have been thought to pump groundwater, now risk being redefined as wells pumping surface water. As a result, many farmers who depend upon a source of groundwater that they thought was a legal right appurtenant to their title in land, will be deprived of the very font of their livelihood.

ARGUMENT

I

THE SCOPE OF ANY CONSTITUTIONAL LIMITATION ON SO-CALLED "JUDICIAL TAKINGS" IS AN IMPORTANT QUESTION OF FEDERAL LAW

The United States Supreme Court has recognized that "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). Nevertheless, when rights defined by state law are protected by the United States Constitution, the infringement of those rights becomes a question of federal law that is properly resolved by this Court. This is so even when the infringement is allegedly accomplished by state courts. In 1930, this Court explained:

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded.

Broad River Power Co. v. South Carolina, 281 U.S. 537, 540-41 (1930) (citations omitted).

The property interest at issue in this case is the right to use water. The Arizona Supreme Court has acknowledged that the right to use groundwater is a property right. *See Bristor v. Cheatham*, 255 P.2d 173 (Ariz. 1953) (explaining that "many and large investments have been made in the development of ground waters. Under these circumstances the court's announcement of the rule becomes a rule of property, and rights

acquired thereunder should not be disturbed . . . ; when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared"); *Town of Chino Valley v. State Land Dept.*, 580 P.2d 704, 709 (Ariz. 1978) (recognizing that interests in the use of groundwater "are property rights"); and *see also In Re Rights to the Use of the Gila River*, 171 Ariz. 230, 235 (1992) ("Water rights are property rights."). As property, these water rights are protected by the Fifth Amendment to the United States Constitution and may not be "taken for public use without just compensation." U.S. Const. amend. V; *see United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-54 (1950) (holding that owners of riparian water rights were entitled to compensation when a federal project deprived them of the use and flow of a stream); *see also Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) (finding that the Fifth Amendment applies to the states through the Fourteenth Amendment). Consequently, whether the courts of Arizona denied the protection the Constitution guarantees to these water rights is a proper question for this Court.

Although this Court may not "substitute its own view" of the state rule that defines property, the Court has repeatedly emphasized that it is proper "to inquire whether the decision of the state court rests upon a fair or substantial basis." *Broad River Power Co. v. South Carolina*, 281 U.S. at 540-41. As the Chief Justice, along with Justices Scalia and Thomas, recently explained,

> [t]hough we generally defer to state courts on the interpretation of state law–*see, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)–there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

Bush v. Gore, 121 S. Ct. 525, 535 (2000) (Rehnquist, C. J., concurring). More particularly, where constitutional rights have been an issue, this Court has searched the decisions of state courts to determine whether the holdings of state courts could be reconciled with state law precedent or, instead, whether the scope of state law had been suddenly, unconstitutionally broadened. *See, e.g., Bush v. Gore*, 121 S. Ct. at 535 (Rehnquist, C. J., concurring) (discussing *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

This practice of searching state law has particular meaning in the context of the Takings Clause of the Fifth Amendment. As Chief Justice Rehnquist, and Justices Scalia and Thomas, explained, the Supreme Court's

> jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

Bush v. Gore, 121 S. Ct. at 535 n.1 (Rehnquist, C. J., concurring). Consequently, this Court has reviewed the legislative and regulatory acts of state and local governments to determine whether they violate property rights and require just compensation for property owners. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (involving South Carolina's Beachfront Management Act); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (concerning permit conditions imposed by a regulatory agency). However, the Court has said very little about any constraints the Fifth Amendment may place on the acts of state courts.

Nevertheless, it seems clear that the judiciary is just as capable of violating constitutional rights as are the legislative and executive branches of government. *See Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (prohibiting the courts from enforcing racial discrimination); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (prohibiting courts from restraining freedom of speech pursuant to statute). But, this Court has offered little guidance as to how far a court may go in defining and redefining property rights.

Since "[i]t is emphatically the province and the duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it falls to this Court, ultimately, to say what limitations, if any, the Fifth and Fourteenth Amendments place on the power of state courts to redefine the nature of property.

II

THIS COURT HAS NOT ADDRESSED THE SCOPE OF "JUDICIAL TAKINGS"

In *Muhlker v. New York & H. R. Co.*, 197 U.S. 544 (1905), this Court confronted the problem of retroactive changes in state property law made by state courts. The New York Court of Appeals had denied compensation to landowners when elevated railroads had been constructed over their property, rejecting judicial precedents that guaranteed compensation. In addressing this problem, four members of this Court exclaimed:

> When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New

> York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.

Muhlker, 197 U.S. at 570. This language suggests that the Fifth Amendment prohibits state courts from modifying state property law in a way that takes away vested rights. But, it is only the opinion of four justices. In contrast, a dissent from Justice Holmes took the opposite view and also represented the views of four justices. According to Justice Holmes, the nature of property rights is so thoroughly a question of state law that the Court is "bound by the distinctions and the limitations of those rights declared by the local courts," and state courts can change the nature of property rights without being constrained by the Constitution. *Muhlker*, 197 U.S. at 572-77. Since each view commanded an equal number of votes, it is unclear from *Muhlker* what, if any, constraints the Fifth and Fourteenth Amendments place on the power of judges to retroactively change the nature of property.[2]

Unfortunately, in the 96 years since *Muhlker*, the problem of "judicial takings" has not become more clear. To the contrary, this area of jurisprudence has produced only doubtful precedent. For example, this Court has never overturned a judicial change in state property law on Fifth Amendment grounds, or required just compensation, even if the change had a significant impact on vested rights. Rather, some cases even suggest that the Constitution cannot restrict changes in the common law because the common law is by its nature changing. *See, e.g.*, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673

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[2] Justice Brown concurred with the justices that found a taking, but only in the result. No group of justices commanded a majority as to the basis for the decision.

(1930). Nevertheless, in 1967, Justice Potter Stewart wrote a concurrence in *Hughes v. Washington*, 389 U.S. 290, that has seemingly given life to the concept of "judicial takings."

In *Hughes v. Washington*, the owner of oceanfront property in the State of Washington brought suit against the state to determine whether the right to accretions was controlled by state or federal law. Under federal law, accretions belonged to the owner, but under state law, they belonged to the state. The Supreme Court of Washington had found that state law controlled and interpreted the state's constitution to deny the owners of oceanfront property in the state any further rights in future accretions. The United States Supreme Court reversed, holding that the question was governed by federal, not state, law, and that under federal law, the property owner, who traced her title to a federal grant prior to statehood, was the owner of accretions. However, Justice Stewart's concurring opinion has become more significant than the opinion of the majority.

In concurrence, Justice Stewart proclaimed that states cannot take property by simply redefining it. When a state makes a decision about the nature of property that

> arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Hughes v. State of Washington, 389 U.S. at 296-97 (Stewart, J., concurring).

Since *Hughes*, this Court has declined to address the question of "judicial takings," despite opportunities to do so. According to Professor Barton Thompson, "the Court has so far declined all offers to revisit the issue."

> Indeed, the Court treated the one judicial takings case that it has heard since Hughes as a traditional takings challenge—never mentioning the difficult issue of whether judicial changes in the law may violate the takings protections. . . . *Pruneyard* [*Shopping Center v. Robins*, 447 U.S. 74 (1980)] was a judicial takings case . . . . Yet the United States Supreme Court entirely ignored the question of whether judicial changes in the law are even subject to the takings protections. Instead, the Court treated the case as presenting a conventional takings question and concluded that, although there had "literally been a 'taking'" of property, the taking did not unreasonably impair the value or use of the shopping center and thus was not unconstitutional.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1469-70 (1990).

Although this Court has not addressed the "judicial takings" question, it has cited Justice Stewart's concurrence in *Hughes* with approval. In *Hughes*, Justice Stewart stated:

> Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property–without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

389 U.S. at 298. This language found its way into the Court's opinion in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Although this Court found the issue "unnecessary to decide," it offered Justice Stewart's statement for the proposition that recognizing Arizona's sudden claim to a portion of submerged riverbed "would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation." *Bonelli*, 414 U.S. at 331. Although *Bonelli* was subsequently overruled, and *Hughes* limited by *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Court's inclusion of this passage gives added weight to the notion that the Constitution does indeed place limits on the ability of state courts to redefine property.

Despite these many clues about the meaning of the Fifth Amendment as a constraint on judicial action, this Court has not resolved the issue. At present, there is significant uncertainty as to how, if at all, the Takings Clause limits state courts. This Court should grant the petition for writ of certiorari in this case in order to clearly define these limits.

III

THIS COURT SHOULD ADDRESS THE SCOPE OF "JUDICIAL TAKINGS" IN THIS CASE BECAUSE OF THE IMPACT THE CONCEPT IS HAVING ON STATE AND FEDERAL COURTS AND BECAUSE THE ARIZONA SUPREME COURT HAS REDEFINED STATE PROPERTY LAW SO DRAMATICALLY THAT PRIVATE PROPERTY WILL BE TAKEN

A. Despite the Lack of Guidance from This Court, Courts Throughout the Nation Are Applying the Concept of "Judicial Takings" with Mixed Results

The District of Columbia Circuit summed up the problem when it declared in 1987 that "the question of whether courts, as opposed to legislative bodies, can ever 'take' property in

violation of the Fifth Amendment is an interesting and by no means a settled issue of law." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987). Despite the fact that the issue is unsettled, federal and state courts throughout the United States are deciding cases based upon the scant precedent that exists.

In *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978), the District Court of Hawaii held that the Supreme Court of Hawaii had taken beach property from the owners by ruling that the seaward line that separated public from private property was located at the vegetation line rather than the mean high tide line. *Sotomura*, 460 F. Supp. at 482. Specifically, the court held that

> [t]he Hawaii Supreme Court's retroactive application of the Ashford standards to locate the seaward boundary of property at the vegetation line, following erosion, ignoring vested property rights and without determining the extent of actual erosion, was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution.

Id. at 482-83. The *Sotomura* court even declared that

> [i]n an appropriate case, it now appears that the United States Supreme Court today would probably vote with Mr. Justice Stewart in ruling that a taking of private property through a radical and retroactive change in state law, effected by judicial decision, is an unconstitutional taking. Justices Marshall and White, the dissenters in *Oregon*, might even agree since they stated there:

> Stare decisis should be more than a fine sounding phrase. . . . Accordingly, "(a) substantial departure from precedent can only be justified . . . in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment" (Quoting from *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 at 634-635, 94 S. Ct. 1895, 40 L. Ed. 2d 406). Such admonitions are even more salient where land titles are concerned.

Id. at 481 (quoting *Corvallis Sand*, 429 U.S. at 394-95). The United States Court of Appeals for the Ninth Circuit reached a similar conclusion in *Robinson v. Ariyoshi*, holding that a state must bring condemnation proceedings before it may interfere with vested rights. 753 F.2d 1468, 1475 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

Justice Stewart's concept of judicial takings has grown to have influence not only in federal courts, but also in state courts. Numerous state courts have refused to overrule prior precedents out of concern that doing so might violate the provisions of the Fifth Amendment. *See, e.g., Bott v. Natural Resources Comm'n*, 327 N.W.2d 838, 849-53 (Mich. 1982) (refusing to expand public access to waterways); *Oregon v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Or. 1977) (refusing to change rules concerning ownership of riverbeds in case of avulsion); and *Dolphin Lane Assoc. v. Town of Southampton*, 339 N.Y.S.2d 966, 975 (1971) (refusing to change dividing line between public and private beach), *aff'd*, 351 N.Y.S.2d 364 (1973), *modified*, 37 N.Y.S.2d 292, 3 (1975). In contrast, where state courts have suddenly modified state property law, dissenting judges have complained using takings arguments. *See, e.g., Van Ness v. Borough of Deal*, 393 A.2d 571, 577-78 (N.J. 1978) (Mountain, J., dissenting); and *Hawaii v.*

Zimring, 566 P.2d 725, 756 (Haw. 1977) (Vitousek, J., dissenting).

Plainly, the notion of "judicial takings" has had a real influence on our nation's courts. Both federal and state courts are unclear as to how they should proceed. Some federal courts have found "judicial takings," while many state courts, wary of violating Justice Stewart's opinion, have failed to act. Other state courts have acted to change state property law in the face of dissents claiming that the decisions are unconstitutional under Justice Stewart's rule.

When the meaning of a provision of the Constitution is so unclear that courts throughout the nation don't know how or if the rule applies, providing clarity should be an urgent concern of this Court. As Professor Hellman has explained, "the fact that a federal statute has been enacted, or a constitutional provision adopted, tells us that the American people have made a decision that a matter should be dealt with in the same way throughout the nation." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 757 (1995).

Rather than deal with "judicial takings" "in the same way throughout the nation," each court seems to choose its own rule, or ignore the question altogether. This must be wrong. Either the Fifth Amendment limits the power of state courts to suddenly change state property law, or it does not. Only this Court can decide whether, and how, the Fifth Amendment applies to these cases. Therefore, this Court should provide a clear rationale for distinguishing permissible judicial modifications to property from the impermissible. This case provides a good opportunity for the Court to do this.

B. This Case Presents a Good Opportunity for Resolving the Problem of "Judicial Takings," Because the Changes in Precedent Are Clear, and the Impacts on Property Are Severe

The traditional principles governing Arizona groundwater law were defined by the Arizona Supreme Court in *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.*, 4 P.2d 369 (Ariz. 1931), in which the court ruled that, with narrow exceptions, groundwater was not subject to appropriation with surface water. It is clear that the *Southwest Cotton* court understood the magnitude of its task to clearly define water rights. The court explained:

> The case is one of the most important which has ever come before this court, involving as it does not only property interests of the value of many millions of dollars, but also a declaration of legal principles which will in all probability determine and govern to a great extent the course of future agricultural development within the arid regions of Arizona. . . . We think, however, this case is proof that the time has come when it is necessary for the protection and guidance of future agricultural development in the state that these principles should be enunciated as clearly and definitely as possible, so that our citizens may know how to guide their future procedure.

Southwest Cotton, 4 P.2d at 372.

The *Southwest Cotton* court believed that a clear enunciation of legal principles was necessary to protect future agricultural development in the state. Moreover, the court decided the differences between surface water and groundwater with the understanding, and expectation, that the rule it declared would be relied upon. Unfortunately, after the decision by the

Arizona Supreme Court in this case, *Southwest Cotton* no longer governs.

In *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999), the Arizona Supreme Court said it perceived its role as "'interpreting *Southwest Cotton*, not refining, revising, correcting, or improving it.'" *Id.* at 744 (quoting *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236, 1243-47 (Ariz. 1993)). Yet in this case, the Arizona Supreme Court has made significant revisions in the rules announced by *Southwest Cotton*, rules that had been in place for 70 years. Specifically, the Arizona Supreme Court has abandoned any requirement that appropriable groundwater be confined in "well-defined channels."

From the earliest point in Arizona law, which derived from the rules of Mexican law that were in existence at the time Arizona became a state, the state could authorize the appropriation of underground waters only if they ran in definite channels. *See Southwest Cotton*, 4 P.2d at 374. In furtherance of this policy, the Legislature adopted Article 22 of the Bill of Rights, which permitted the Legislature to allow appropriation of "'[a]ll streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation.'" *Id.* at 373. In *Southwest Cotton*, the Arizona Supreme Court made it clear that if this power over appropriation is to extend to underground waters, it must include only those underground waters that are similar to "streams, lakes and ponds."

> We hold, therefore, that article 22 of the Bill of Rights applies only to surface rivers, lakes and ponds, as the words are ordinarily understood, *and to subterranean waters of a similar character*, and that its effect was to establish the doctrine of prior appropriation for such waters, and for them only,

> leaving percolating subterranean waters of all kinds untouched thereby.

Id. at 374 (emphasis added). The court made especially clear that the power of appropriation was not to extend to those waters that would be difficult to define as surface water by the regular people who would actually use the water.

> It is unreasonable to attribute to the legislature in 1864 a purpose to use nontechnical language to express an idea which would not be anticipated by the men who were to be governed in their actions by that language; and to assume that in the use of words "rivers, creeks or streams," and "rivers, lakes or ponds" it intended to include something which by common understanding was given an entirely different classification would be absurd.

Id. Accordingly, appropriation of underground water was only permissible where the water flowed in "definite underground channels." Section 3280, Revised Code of 1928. The same rule applies today, or would apply today but for the Arizona Supreme Court's decision in this case. *See, e.g.*, Ariz. Rev. Stat. § 45-101 (2000) (specifying that "[g]roundwater does not include water flowing in underground streams with ascertainable beds and banks," and defining "surface water" to include water flowing in "definite underground channels"). Traditionally, the water "flowing in natural channels between well-defined banks," with known boundaries was subject to appropriation. *Southwest Cotton*, 4 P.2d at 376 (quoting *McKenzie v. Moore*, 176 P. 568 (Ariz. 1918)). But water that does not flow between well-defined banks would not be subject to appropriation.

This basic rule was preserved by the Arizona Supreme Court in *Southwest Cotton*. The *Southwest Cotton* court considered one of the "essential characteristics of a watercourse" to be "a channel, consisting of a well-defined bed and banks." *Id.*

at 376. While many different factors could be considered in determining the location of underground channels, each of them,

> when examined, must be such as to afford clear and convincing proof to the satisfaction of a reasonable man, not only that there are subterranean waters, but that such waters have a definite bed, banks and current within the ordinary meaning of the terms.

Id. at 377. Despite this requirement, the same court has abandoned this rule in the present case. Instead, the rule imposed by the Arizona courts depends entirely upon whether "drawing off the subsurface water tend[s] to diminish appreciably and directly the flow of the surface stream." *In General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069, 1074 (Ariz. 2000). If taking groundwater does affect the surface stream, the Arizona court considers it surface water, regardless of whether it flows in "a channel, consisting of a well-defined bed and banks."

The *Southwest Cotton* court viewed its rule as being so narrowly drawn that "[i]n almost all cases the so-called subflow is found within, or immediately adjacent to, the bed of the surface stream itself." *Southwest Cotton*, 4 P.2d at 381. The *Southwest Cotton* court referred to a California case, *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899), to describe the extreme outer boundary of how broadly it believed the rule it declared could be applied. In *Pomeroy*, the San Fernando Valley of California had at its lower end "a gorge, about two miles wide, through which all the waters of the valley eventually flow[ed]." *Southwest Cotton*, 4 P.2d at 381. Because all the water of the valley flowed through the gorge, the water course had defined banks. The evidence showed that the water claimed to be subflow "lay substantially beneath the surface of the bed of the Los Angeles River." *Id.* The *Southwest Cotton* court found that in this situation, where the

water passage was two miles wide, with defined banks, and the water flowed substantially underneath the surface stream, "the doctrine of subflow ha[d] been extended as far as it [could] reasonably be carried." *Id.*

The Arizona Supreme Court has gone much farther than the narrow rule of *Southwest Cotton* would allow. Where *Southwest Cotton* found a two-mile wide water course to be the outer boundary of what would be permissible, in this case, appropriable surface water could be as far as six miles away from the "subflow zone" that the trial court defined, which is even farther from the river itself. Petition for Writ of Certiorari of Phelps Dodge Corporation and Arizona Public Service Company at 15. Where *Southwest Cotton* would require well-defined banks for underground streams, in this case, the banks of the stream are irrelevant–no reference to them is made in the Arizona Supreme Court's new rule. Whereas the *Southwest Cotton* court would require subflow to be substantially beneath the surface stream, in this case, subflow can be many miles from the surface stream.

Rather than recognize the legal rights defined in *Southwest Cotton*, the Arizona courts in this case have endeavored to conform those rights to what science sees as "hydrological reality." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d at 1073. The Arizona Court acknowledged that "even though *Southwest Cotton* may be based on an understanding of hydrology less precise than current theories, it would be inappropriate to undo that which has been done in the past." *In re General Adjudication of All Rights to Use Water in the Gila River System & Source*, 857 P.2d at 1243. Nevertheless, the Arizona court has approved a new rule that will permit the contours of property to change with every scientific advancement. As hydrologists become more capable of detecting the influence of distant wells on surface streams, the property rights of groundwater users will continually shrink.

By abandoning the requirement that appropriable underground water be in well-defined banks substantially beneath the surface stream, the Arizona Supreme Court has changed the way surface water is distinguished from groundwater. Consequently, some of those who formerly pumped groundwater will be considered to be pumping surface water and will lose their property rights in water in the course of this adjudication.

CONCLUSION

Because this case involves an important question of federal law that has not been, but should be, settled by this Court, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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